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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 52

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

INTERNATIONAL UNION, UAW, AFL-CIO,
AMALGAMATED LOCAL UNION NO. 310,
Intervenor,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY.

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ACME INDUSTRIAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY.

Acme Industrial Company (hereinafter referred to as the "Company") accepts the references to "Opinions Below," "Jurisdiction," and "Statute Involved" set forth in the brief of the Petitioner, the National Labor Relations Board (hereinafter referred to as the "Board"). (The Intervenor shall be referred to herein as the "Union.")

QUESTION PRESENTED.

We note that the Board has phrased its version of the question here presented in terms of the propriety of the Company's refusal to give information to the Union "necessary to its administration of the agreement." (Pet. Br., p. 2.) The question presented in the Board's petition for certiorari characterized the information requested as "relevant to a grievance. . . ." (Petition, p. 2.)

Both Board statements of the question actually beg one of the questions actually involved. One assumes that the information requested was "relevant"; the other assumes the information requested was "necessary." Neither assumption is proper in this case.

We submit that the questions here involved may be stated accurately as follows:

1. Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish a union with information which is not presumptively relevant to wages, hours or other terms and conditions of employment and for which no proof of relevance has been shown.
2. Whether information which may be *related* to a collective bargaining agreement must, *ipso facto,* under the provisions of Section 8(a)(5), be given to the union requesting same.

STATEMENT.

Between January 13 and March 3, 1964, the Union filed eleven grievances under its labor agreement with the Company concerning the removal of certain pieces of machinery (G. C. Exs. 4-A through 4-K; R. 44, 109-123).

The first such grievance claimed that the Company's

removal of a Kleerman machine violated the labor agreement (G. C. Ex. 4-A; R. 44, 109). The Company's reply to this grievance was as follows (G. C. Ex. 4-A; R. 44, 110):

> "The machine involved was moved 10-18-63. This complaint was filed almost 3 months later. No employee was working on the machine at the time of its removal. No employees were reduced in classification or laid off as a result of the machine's removal. There was no contract violation."

The uncontroverted testimony before the Trial Examiner was that the machine in question had at one time been utilized by Tool Room employees; that the number of Tool Room employees had remained unchanged from the commencement of the existing labor agreement to the date of the grievance; and that no Tool Room employee had been reduced in classification during this same period (R. 45-46).

Another later grievance also involved the removal of a second piece of equipment used by Tool Room employees (G. C. Ex. 4-G; R. 44, 117-118) concerning which also the uncontroverted testimony was that no change in Tool Room employees' status had taken place since the labor agreement had gone into effect (R. 52). This grievance stated, in part (R. 117):

> "On Wednesday, Feb. 19, 1964, one Hauser Jig Borer Machine from the Tool Room was moved out of the plant.
>
> "In our written Contract with the Company, we feel the Company is obligated to meet with the Shop Committee of Local # 310 and negotiate any and all machinery being removed from the plant when it displaces or denies employment to Bargaining Unit Employees."[1]

A third grievance challenged the removal of two jeweler's lathes (G. C. Ex. 4-B; R. 44, 111). The uncontroverted

1. Another grievance involved the same equipment, but its claim concerned the Company's refusal to allow the Steward time off to write up the first grievance (G. C. Ex. 4-F; R. 44, 116).

evidence concerning this equipment was that there were two jeweler's lathes in the plant when the labor agreement went into effect, and two in the plant when the grievance was filed (R. 46-47); and that at no time since the effective date of the agreement did the Company employ anyone in the jeweler's lathe classification (R. 47).

In a fourth grievance, the removal of a multiple drill press was challenged (G. C. Ex. 4-C; R. 44, 112). This press had not been used by the Company since the effective date of the labor agreement to the date of its removal (R. 48-49).

A fifth grievance (G. C. Ex. 4-D; R. 44, 113) concerned equipment which had only occasionally been used by employees classified as External Grinders doing slotting and grooving work (R. 49). No employees in this classification were laid off or reduced in classification during the term of the labor agreement (R. 49-50) and the type of work involved was still performed in the plant occasionally (obviously on other equipment) (R. 50).

The next grievance read, in part, (G. C. Ex. 4-E; R. 44, 114):

> "This grievance is being written in regard to the violation of the Company's action regarding the removal of the two (2) O.D. Grinding Machines on Thursday January 30, 1964 from the premises.
>
> "In our written contract with the Company we feel that the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed, transferred, sold, loaned, rented, etc."

With respect to the classification of employees who worked on this equipment, the uncontroverted testimony was that there were *more* employees in this classification subsequent to the removal than there had been previously (R. 51), none

having been laid off or reduced subsequent to the removal (R. 52).

As to three other grievances, two (G. C. Ex. J and K; R. 44, 121-123) involved equipment which had not been used since the labor agreement went into effect (R. 53, 54), and one (G. C. Ex. 4-I; R. 44, 120) involved equipment that had not been used for several years (even prior to the effective date of the agreement) (R. 53).

Finally, one grievance (G. C. Ex. 4-H; R. 44, 119-120) challenged the removal of a piece of equipment, a chucker machine, *which had not been used for the 8 to 10 years prior to its removal* (R. 52)!

With respect to certain of these grievances, the Union asked the foreman of the department where the equipment had gone, and why. For example, with respect to the first grievance (G. C. 4-A; R. 44, 109), the Union Vice President testified (R. 64):

> "A. I asked Mr. Steelhammer if he would give me as a union representative the information that we felt was needed when we were aware of the fact that machinery was being moved out of the plant which without this information forthcoming we were unable to continue—or even originate the filing of a grievance."

And, in another case (R. 70):

> "A. I asked him for information which the union was seeking, the reason of the removal of these thread grinding machines and besides asking the reason I asked where they might be going."

However, it was uncontroverted in the record that in only one out of eleven cases did the Union ask the Company representative for any information concerning the equipment in the higher steps of the grievance procedure (R. 57). And, in that one case, the record discloses the following (R. 57):

"Q. They didn't ask you for the information?
"A. No sir.
"Q. Not at all?
"A. Only in connection with one grievance. They were joking with me about it and they said, 'Well, we know where it went anyway and what it is used for.'
"Q. They said that?
"A. Yes.
"Q. Who said that?
"A. Mr. Antalek and Mr. Rich."

Both Mr. Antalek and Mr. Rich testified at the hearing; neither denied the contents of this conversation with the Industrial Relations Manager.

One month after the last of the eleven grievances was filed, the Union wrote the Company the following letter (G. C. Ex. 5; R. 58, 124):

"The Union requests that the Company furnish the following information at the earliest possible date:

1. The approximate dates when each piece of equipment was moved out of the plant.
2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.
3. The number of machines or equipment that was moved out of the plant.
4. What was the reason or purpose of moving the equipment out of the plant.
5. Is this equipment used for production elsewhere.

"The information we are asking for is essential to the Union for the servicing and administration of the current contract."

The Company replied (G. C. Ex. 6; R. 59, 125-126):

"We were unaware that our relationship with your union had reached the stage when correspondence such as your letter of April 3, 1964 has become necessary. However, while we are of the opinion that it is not the scope and complexities of our relationship that

dictates your use of this medium but, rather, that you are now attempting to build an unfair labor practice charge case, we shall, nevertheless, hereby respond.

"We presume that your questions relate to Article VI, Section 10 of our labor agreement, although you do not specify the relevance and/or utility of the questions. We note that this section establishes a right of transfer, with certain limitations, to employees '. . . who are subject to reduction in classification or layoff as a result of . . .' the movement of any equipment to another location of the Company. We also note that under Section 4 of Article IV of our labor agreement, grievances relating to layoffs must be filed within five (5) working days thereafter, and grievances relating to transfers must be filed within three (3) working days thereof.

"We are aware of no layoffs nor of any reductions in any classification within five (5) working days prior to your letter, and we, therefore, conclude that there is no proper basis upon which your request for information may lie. You have available all the information you need to determine whether or not any employees' rights are being violated. Furthermore, the broad scope of your questions is indicative of a fishing and harassment expedition rather than a true desire for necessary information.

"Please be assured that we shall continue to cooperate with your union in providing whatever proper informaton you request for your aid in servicing and administering our labor agreement."

Several weeks later the Union filed a refusal to bargain charge (R. 1), although the record is clear that even up to the date of the hearing, the Company had not refused to take any of the grievances to arbitration (R. 93).

Thereafter, a Complaint was issued alleging that (R. 5):

". . . Respondent has refused, and continues to refuse, to furnish to the Union data relating to the removal of equipment and machines from Respondent's plant, such information being necessary to the processing of

pending grievances and the administration of the existing collective bargaining agreement."

The Company moved to dismiss the Complaint (R. 11-15), but the motion was denied on the following basis (R. 16):

> "Upon consideration thereof, it appears from said pleadings that issues of fact are being raised which can properly be determined only in the light of evidence to be adduced at a hearing."

The hearing before the Trial Examiner took several tangents. At first, when the Company attempted to elicit testimony concerning the total lack of effect upon bargaining unit employees by the equipment removal, Counsel for the General Counsel (R. 45) and the Charging Party (R. 46) objected. The Trial Examiner overruled these early objections (R. 48):

> "Now, I might construe this contract to mean that if there were no employee affected by a layoff, no employee put in a reduced status, then the contract was not invoked, the contract clause was not invoked and that the information would not be required under the contract, not under Board law. That is why I want to get this information."

This position was apparently based upon his opinion expressed a few moments earlier (R. 47):

> "I am going to permit him to get in the evidence. That is my ruling, because I think there is a very serious question as to should this be before the Board."

However, the objections continued and the Trial Examiner began to change his position (R. 50):

> "Mr. Kovar: I have been interrupted constantly in an attempt to question this witness, this witness who incidentally was subpoenaed by the General Counsel, this witness who was called to the stand by the General Counsel, this witness who is at the present time the General Counsel's witness.
>
> "On cross-examination it seems to me that I am

allowed great latitude to this type of questioning. I have been asking or attempting to ask questions to this time concerning grievances which the General Counsel introduced in evidence. Why I must be subjected to this constant harassment is completely beyond me, sir.

"Trial Examiner: I am giving the General Counsel a standing objection. I have made my ruling on the proper examination. I have granted you the scope to cross-examine particularly on these grievance papers which were introduced by the General Counsel. However, the General Counsel has made no contention that any employees were laid off or were put in a reduced status as the result of the moving of any equipment. I think we are trying something that is not an issue in the case.

"Mr. Lazar: Exactly.

"Trial Examiner: This is my objection to it."

And, then finally, when the Company tried to prove that the Union knew that no employee had been affected by the machinery removal, the Trial Examiner reversed his position and upheld the objections (R. 77-78):

"Q. With respect to any one of the grievances introduced in evidence by General Counsel, can you tell me if any employee had been laid off within five days prior to the filing of any one of these grievances? And you take as much time as you wish to study them if that is required sir.

"A. Will you repeat that.

"Trial Examiner: I don't think that this is any allegation.

"Mr. Lazar: There is no such allegation. I don't think it is material or pertinent.

"Trial Examiner: Until the General Counsel alleges that someone was laid off within the five day period or even without it, I will sustain the objection, Mr. Kovar.

"Mr. Kovar: I think this testimony goes beyond that, Mr. Trial Examiner. I think this testimony goes to the fact that not only has there been no allegation

concerning layoff or reduction of classification, there is first hand information available to the union and therefore to the General Counsel concerning this matter and that the silence with respect to it now is not a matter that they don't know. It is a matter that there hasn't been any, Mr. Examiner.

"Trial Examiner: I am not interested in that. They haven't alleged any. That settles it. No. 8(a) (3) has been alleged.

"Mr. Kovar: It is not a question of that. I have a difficult time myself trying to figure out the theory upon which this case has been based but if we look at the contract, it seems to me that the information available to the union from which I am trying to get testimony concerning is sufficient for it to administer the contract and police the contract.

"Now, unless I can get such testimony in the record—

"Trial Examiner: You are not going to get testimony of this type into the record unless the General Counsel introduces testimony which relates to an allegation.

"The objection is sustained."

The Trial Examiner then maintained a consistent position, sustaining all objections to the Company's efforts to show the total irrelevance of the information requested (R. 81-83):

"Q. (By Mr. Kovar.) Does the union receive written notification of any employees or employee who is laid off?

"Mr. Lazar: Objection.

"Trial Examiner: Has this been answered already?

"Mr. Lazar: We have already decided that this is not an issue.

"Trial Examiner: I think we have. Thank you. Sustained.

"Mr. Kovar: I don't think it has been decided that this is not an issue, Mr. Trial Examiner.

"Trial Examiner: I would now rule that it is not an issue.

"Mr. Kovar: May I be heard before you rule, Mr. Trial Examiner?

"Trial Examiner: Yes, sir.

"Mr. Kovar: Under Article 6, Section 10 of the collective bargaining agreement, the parties have negotiated a provision which requires that where equipment is moved to another location of the company an employee who is then working in the plant who is subject to reduction in classification or is subject to layoff as a result thereof has certain rights.

"Trial Examiner: Yes, that is right.

"Mr. Kovar: If the union knows that there are no such employees as we have attempted to indicate is the fact through the testimony we have sought to introduce here, then it seems to me clear on the face that the additional information as to where equipment is moving is completely irrelevant to this contract, to the administration, to its enforcement.

"Now, unless I can get into the record clear testimony the fact that the union knows very well that no employee has been laid off as a result of removal of equipment and knows very well that no employee has been reduced in classification as a result of this, I have an open question at which point the General Counsel may argue, 'Well, we don't know whether anyone has been laid off or not, and therefore, it might be, this information might be relevant so why not give it.'

"So, facing that kind of argument, this is relevant.

"Trial Examiner: I will accept that kind of argument to the pleadings in this case. So I still consider this question irrelevant as to what is contained within the issues here which I construe is much more narrow than apparently the parties.

"This is a very narrow complaint. In effect you are anticipating allegations which have not been made. In other words, asserting an affirmative defense where there is no attack, where no attack has been placed by the General Counsel. I don't think that is necessary. The General Counsel has not made the direct allegation and submitted evidence in support thereof and there is no necessity for you to rebut it."

At the hearing, the Trial Examiner explained his final position as follows (R. 91-92):

"Trial Examiner: I don't think I need to hear from the General Counsel at this point. I am going to reject the offer of proof.

"In the first place, the contract of cause [sic] is binding upon the parties. Now the question of its construction and application is provided for in the grievance procedure. They go to arbitration. The only question before me is whether the union is entitled to other—is entitled to information under these. Granted, they waived all of these other claims or did not waive them, that is not an issue before me. There has only been a question of information which would enable them to intelligently administer the contract.

"I am a little disturbed in the fact that—not in this case but in so many other cases—where a collective bargaining agreement has been reached by the parties and thereafter they come running to the Board because they are disappointed in the agreement that they have signed.

"I tend to think this breaks down the entire machinery of collective bargaining.

"I am going to reject your offer of proof. In every case we can't go through all negotiations which led to a contract. I think it is partly the Board's own fault that they haven't discouraged this. I say, 'You have made your contract,' why don't you go where you belong with it. And I also under the Board's point being sustained by the Supreme Court that we have exclusive jurisdiction to cure unfair labor practices. You have to have a balance somewhere there between stabilization of contract and therefore the stabilization of the collective bargaining process and the curing or remedying of unfair labor practices.

"I reject that offer of proof. I have tried to confine this case much more closely than I have been able to. It not only breaks down the collective bargaining machinery, I don't see how it helps the peaceful settlement of dispute which the Act is supposed to encourage

for the Board to intervene where a contract has been made.

"That is all I have to say on this."

In his decision, in which he recommended the dismissal of the Complaint in its entirety, the Trial Examiner made no finding as to the relevance of any information requested (R. 23-25). He concluded (R. 24):

> "The parties have clearly stated that it should be submitted to arbitration and the Charging Party has, in effect, attempted to use the Board as a means to discovery and inspection in furtherance of its arbitration proceeding.[4] This is not, at least as I see it, a proper function of an agency already overburdened by its caseload. Overburdened, one might add, to a point where it may fail to serve as a functional apparatus for the prevention of unfair labor practices."

The Labor Board reversal of the Trial Examiner was based upon two findings: The first was that the information requested could be "related" to several provisions of the agreement (R. 28). Secondly, that the information sought was "necessary" to the Union in order for it to "evaluate intelligently the grievances filed. . . ." (R. 29.) There was *no* attempt to explain this finding of necessity.

The Court of Appeals for the Seventh Circuit reversal of the Board's decision noted that the Union's failure to follow the grievance and arbitration proceedings, to which the parties had agreed, appeared, in and of itself, to constitute a refusal to participate in the collective bargaining process. The Court went on to hold (R. 133):

> "Where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive pro-

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4. "It would appear anomalous for the Board, which does not provide for discovery and inspection in its own proceedings, to serve as an instrument for such procedure in arbitration proceedings." (Footnote by the Trial Examiner.)

visions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.

"The Board's order is set aside and its enforcement is denied."

SUMMARY OF ARGUMENT.

There has been an apparent assumption made by both the Board and the Union in this case that it should be treated as if it had occurred in a factual vacuum.

There have been pronouncements of principles; enunciations of premises; references to General Motors' practices (introduced for the first time in the proceeding before this Court); and scholastic theses as to the proper position of the Labor Board in the administration of collective bargaining agreements.

But there has been a total ignoring of the fact that this employer of approximately 100 employees was found guilty of violating the federal law because he refused to tell the Union where and why he sold one chucker machine—a machine that had not been used for eight to ten years![2]

This employer was found guilty of an unfair labor practice because he failed to inform the Union where and why a mill machine was removed—a machine last used several years before.[3]

This employer was found guilty of refusing to bargain in good faith because he refused to tell the Union where and why two jeweler's lathes were removed—when there were

2. See page 5, *supra* (G. C. Ex. 4-M; R. 44, 119-120, 52).
3. See page 5, *supra* (G. C. Ex. 4-I; R. 4, 120, 52-53).

the same number of jeweler's lathes after the removal as there had been before.[4]

An odious injustice has occurred where a small employer has been enveloped in the Labor Board's pell mell rush to enter into the field of labor contract administration. With all due respect we recall that "fools rush in where angels fear to tread,"[5] which is, we submit, particularly applicable in light of Professors Cox and Dunlop's statement that "undoubtedly the NLRB can never acquire the feeling of the experienced arbitrator or umpire for a particular situation."[6]

But be that as it may, the point remains that this employer has spent close to three years in defending himself against a charge of refusing to bargain because of the above described situations. In his behalf we must assume that "God's mill grinds slow, but sure,"[7] and we do here seek that this Court will uphold the Circuit Court's vindication of this employer.

We believe it cannot be a violation of Section 8(a)(5) to refuse to give information which is neither presumptively nor proven relevant and we are certain that the record of this case shows neither presumptive nor proven relevance. Thus, we submit that the facts of this case do not support the Board's position.

As to the question of law here involved, we believe that the Board has also erred.

The broad brush treatment of applying generalizations to the question of the Board's jurisdiction vis-a-vis labor arbitrations beclouds the real legal issues. The question here

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4. See pages 3, 4, *supra* (G. C. Ex. 4-B; R. 44, 111, 46-47).

5. Pope, "Essay on Criticism."

6. *Collective Bargaining During Contract,* 63 HARV. L. REV. 1097, 1132 (1950).

7. Herbert, George, "Jacula Prudentum."

involved is not whether the Board had jurisdiction to remedy an unfair labor practice which is also a contract violation, or even to remedy an unfair labor practice the existence of which is dependent upon a contract interpretation.

The basic legal question here involved is whether a refusal to bargain-violation can be found to exist where the charged party is attempting to rely upon the bargain the parties mutually reached. Can't the parties mutually agree to channel their bargaining relationship during the term of their agreement? How can it possibly be a refusal to bargain to rely upon the bargain previously reached? The General Counsel's attempt to issue judgment upon the propriety of the employer's contract reliance was properly challenged by the Trial Examiner in recommending that the Complaint in this case be dismissed in its entirety. He stated (R. 25):

> "... We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of contracting union may be taken to review by the Board under Section 8(a)(5)."

We submit that once the parties have made a contract, that thereafter the bargaining obligation is governed by the parties' bargain. This principle, properly applied, would deny any finding of an unlawful refusal to bargain where the accused was relying upon his bargain, his labor contract.

The Board is attempting to use this information case, and the companion case *C & C Plywood* case (No. 53), as a means of pushing itself into the day-to-day established relationships of employers and unions, as a means of declaring itself to be a proper administrator of the parties' labor agreements. Neither of these cases involve an "incursion into the Board's statutory authority" (Pet. Br.

p. 8), but, rather, they involve the Board's invasion of the parties' contractual relationship.

This foray must be recognized for what it is, and must be repulsed if the American industrial society is to continue to grow, is to continue to improve the economic well-being of our nation.

ARGUMENT.

I. THE INFORMATION HEREIN SOUGHT WAS NEITHER PRESUMPTIVELY NOR PROVEN RELEVANT.

In their briefs, both the Board and the Union aver that no question exists concerning the relevance of the information here involved. In all of their argument, this point is assumed. In their haste to formalize *per se* rules of refusals to bargain, both the Board and the Union have, ever since the filing of the charge, ignored the factual situation here involved.

Whether we speak in terms of relevance, or importance, or necessity, a key *factual* question must remain whether or not the refusal to give the information requested constituted an unfair labor practice—a refusal to bargain.

At the hearing, both the Union and the counsel for the General Counsel made it clear that they were unconcerned with whether or not the equipment removal had any employee affect, or whether or not in fact any contract violation were involved.[8] Their apparent assumption was that

8. For example (R. 45):

"Q. (By Mr. Kovar.) Mr. Bellush, with respect to General Counsel's Exhibit No. 4-A which is grievance No. 54, this grievance has to do with the alleged removal of a Kleerman Machine?

"A. Yes.

"Q. Employees in what department utilized that machine prior to April of 1963?

"A. Tool Room employees.

"Mr. Lazar: Objection, Mr. Trial Examiner, I don't know what materiality it has at this point."

See also transcript of proceedings p. 23 (R. 46).

For another example (R. 77):

"Q. As a union representative, are you aware that the company gives written notice to the union of every employee who is laid off? Are you aware of that?

"A. Yes, I am.

the information was necessary for the Union to determine if a contract violation had taken place, because the information *might* be related to the contract. And it was this position which the Board itself obviously accepted (R. 29).

Let us take a look at the facts of the case and determine if any of the information requested was necessary to "evaluate intelligently the grievances filed" (Bd. Dec., R. 29). Let us review the questions asked by the Union (G.C. Ex. 5; R. 124). And, in reviewing each question, keep well in mind that most of this equipment had not been used for years; some had been replaced by other; that the work on some could still be, and was, done on remaining equipment; that in no case was any employee laid off or downgraded as a result of the removal.

The first piece of information sought was "The approximate dates when each piece of equipment was moved out of the plant." It is quite apparent that the pieces of equipment referred to, not otherwise ever being identified, must have been those pieces of equipment identified in the eleven grievances.[9] But, the Company answered the first

"Q. Are you aware that the company gives written notice of any employee who is reduced in classification?

"A. I am.

"Q. With respect to anyone of the grievances introduced in evidence by General Counsel, can you tell me if any employee had been laid off within five days prior to the filing of anyone of these grievances? And you take as much time as you wish to study them if that is required sir.

"A. Will you repeat that?

"Trial Examiner: I don't think that this is any allegation.

"Mr. Lazar: There is no such allegation. I don't think it is material or pertinent."

9. This is further apparent from the Union President's testimony at the hearing (R. 81):

"Q. Now, why did you seek the information that you asked for in that letter?

"A. Well, sir, we felt that unless the company was willing to supply the information that we had requested in this letter we would not be able to administrate the various articles and sections of the contract and also properly process grievances which at that time were pending.

grievance specifically telling the Union when the equipment had been removed (G. C. Ex. 4-A; R. 109-110), and in four others, the grievance itself specified the date (G. C. Exs. 4-D, 4-E, 4-F and 4-G). In light of these facts, can it be said that the refusal to answer this question was a refusal to bargain in good faith, that the Union needed this information to evaluate intelligently the grievances filed?

The third question asked for the "number of machines or equipment that was [sic] moved out of the plant." In view of the fact that the equipment was already identified as to kind and number in the grievances, can it be said that it was a refusal to bargain in good faith to answer this question?

The fourth question asked for the employer's motives in moving the equipment. It would seem obvious on its face that the refusal to answer this should not constitute a refusal to bargain. In the case of a piece of equipment unused for eight prior years, the question might well be considered an insult. In any event, the employer's motivation would have no bearing as to whether the contract were being violated.

The second and the fifth questions related to where the equipment was destined and for what was it being used. These two questions would appear to bear on the parties' contract; in the words of the Board they "can be related

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"Mr. Lazar: I have no further questions.

"Cross Examination.

"Q. (By Mr. Kovar.) Which grievances couldn't you process, Mr. Antalek?

"A. The grievances pertaining to the removal of the machinery, grievances pertaining to the farming out of work, grievances pertaining to people on layoff.

"Q. Can you identify a little more closely as to what grievance you are talking about?

"Trial Examiner: Are these the grievances which have been placed in evidence that you are referring to and filed in the grievance procedure?

"The Witness: Yes, sir."

to either Article I, Section 3, or Article VI, Section 10 of the Agreement." (R. 28.) But the question is not whether they have some *relation* to those sections of the Agreement, the question is whether the refusal to answer them constitutes a refusal to bargain. As this Court pointed out in the *Truitt* case,[10]

> "The inquiry must always be whether or not under the circumstances of the particular case the statutory objective to bargain in good faith has been met."

One section of the contract (Article VI, Section 10), specifically involved removal of equipment to another location of the Company. It read (G. C. Ex. 3; R. 41, 102):

> "Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location."

Knowing that no employees had been laid off or reduced in classification as a result of any equipment removed, and, more importantly, knowing that the Union knew this fact, is it small wonder that the employer considered the questions as they might have related to this contract section to be harassment, not necessary to the Union's function?[11] The only possible violation of this contract section would be the Company's refusal to allow employees laid off or downgraded as a result of equipment removal to follow the equipment. *If* there were such employees, then the Union would need to know where the equipment went and,

10. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149, 153-154 (1956).

11. That the Union knew that no employees had been laid off or downgraded as a result of the removals is without question.

if it were a Company location, whether or not there was a labor contract in effect at such location. But, *knowing that no employee was laid off or downgraded as a result thereof (which information the Union had),* the Union needed no further information to evaluate intelligently a possible violation of this section.

Furthermore, the employer knew from reading the grievances that the Union was taking a position that "In our written contract with the Company, we feel that the Company is obligated to meet with the Shop Committee of Local #310 and negotiate any and all machinery being removed, transferred, sold, loaned, rented, etc." (G. C. Ex. 4-E, R. 44, 114.) The employer had already negotiated such matters with the Union, and had agreed that it would incur certain obligations to employees affected by equipment removals under certain circumstances. Small wonder again, that the employer resisted the Union's demand to re-engage in negotiations during the term of their bargain.

The other section of the contract (Article I, Section 3) to which the Board says the information might have been related read as follows (G. C. Ex. 3; R. 41, 102):

> "Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company. The Company will continue to purchase components and sub-assemblies and to have other outside work done, including the making of tools and dies, where it is not economic to perform this work in the plant, or where production schedules, equipment, employee skills or other factors make it impractical to perform the work in the plant. Violation of the above will be subject to the grievance procedure."

It may be interesting to speculate on the method of reasoning as to what work might be "normally performed by

employees'' on equipment that had been unused for years. But the simple exposé of the lack of relation of the question to this section is that an employer is in no position to say what a third party might be doing with the employer's former equipment. As pointed out in *NLRB* v. *United Brass Works, Inc.*, 287 F. 2d 689, 697 (4th Cir. 1961):

> "We need cite no authority for the proposition that an employer need not be required to accede to a request to furnish information which it did not possess."

Further, there is no direct relationship between subcontracting and an employer's former equipment. Assume, for a moment, that the Company were to have answered the Union's questions herein insofar as they were within the knowledge of the Company.

If the Company had answered that some equipment went to a third party, would that necessarily mean that any subcontracting was taking place? Of course not. If the Company replied that no equipment went to a third party, would that mean that no subcontracting was taking place? Again, of course not. In any event, would it be any more or any less of a contract violation if subcontracting were taking place utilizing equipment formerly owned by the employer? If the Union were really interested in evaluating intelligently a possible violation of Section 3, why didn't it ask whether any subcontracting was taking place?

We note that the Board has given us an opportunity of viewing the type of labor contract interpretation we might expect from it were that to become grist for its mill. It interprets these two contract provisions as follows (Pet. Br. p. 18):

> "Article I, Section 3, and Article VI, Section 10 (R. 96, 102) make it a violation of the contract for the respondent to move machinery either to a subcontractor or to another plant owned by respondent where such movement would deprive employees covered by

the agreement of any work. As we understand its position, respondent does not argue—nor could it tenably so argue under the plain contractual language—that such movements of machinery are left to its unilateral control under these provisions. . . ."

We not only could argue, but we would argue, that under this contract, the movement of machinery is left to the employer's unilateral control: the employer decides *if* the machinery is to be moved; he decides *when* it is to be moved; he decides *where* it is to be moved. Those unilateral decision may give rise to certain contractual obligations, but only if (1) employees then working are affected by the movement and (2) there is no union contract at the new location.

Last, but far from least, the relevancy and importance of all of these questions must be viewed in light of the uncontradicted evidence that only with respect to one grievance did the Union ever ask for any of the information after the grievances were filed. And that one instance took the following course (R. 57):

"Q. They didn't ask you for the information?
"A. No, sir.
"Q. Not at all?
"A. Only in connection with one grievance. They were joking with me about it and they said, 'Well, we know where it went anyway and what it is used for.'
"Q. They said that?
"A. Yes."

It is mandatory upon an administrative agency to proffer to a reviewing court not only its decision and order, but its specific findings as well as "the reasons or basis therefor" Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b). The Board's assumption of relevance and/or necessity in order to use this case for a springboard to new and all-inclusive statements of law is similar to the type of agency decision denounced by the Court of

Appeals in *In Re United Corporation*, 249 F. 2d 168, 179, 181 (3d Cir. 1957):

> "... it is a generalization which is a great deal wider than that which could be based on the facts specifically found. The parties concerned are entitled to have the reviewing tribunal have something more explicit than this type of generalization.
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> • • • • •
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> "... A bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence, as here. Strikingly applicable here is the much quoted statement of Justice Cardozo that 'we must know what a decision means before the duty becomes ours to say whether it is right or wrong.' "[12]

We submit that there is no precedent, no logic, no reason whatsoever why information of the type here sought, under the conditions here sought, must be given a union under pain of being found guilty of a refusal to bargain. We submit that had the Board been less intense in its desire to formulate a *per se* rule of finding a refusal to bargain, it would have long ago dismissed the Complaint in this case.

If relevance of information is required, then this employer should once and for all be freed of the charge of refusing to bargain. The General Counsel never attempted to prove such relevance;[13] the record does not substantiate such a finding.[14]

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12. *U. S.* v. *Chicago M. S. P. & Pac. R. Co.*, 294 U. S. 499, 511 (1935).

13. "The General Counsel has the burden of proving an unfair labor practice by a preponderance of the evidence." *NLRB* v. *Council Mfg. Corp.*, 334 F. 2d 161, 163-164 (8th Cir. 1964) and cases cited therein.

14. "Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes . . ." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

For this reason alone, the decision of the Court below should be affirmed.

II. A PARTY'S INSISTENCE THAT ITS COLLECTIVE BARGAINING AGREEMENT BE HONORED CANNOT AND SHOULD NOT CONSTITUTE A REFUSAL TO BARGAIN.

In recommending dismissal of the Complaint in this matter, the Trial Examiner found that the intervention of the Board in this type of case contributed nothing to industrial harmony and intimated that such intervention might have just the opposite result (R. 25).

> "We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of contracting union may be taken to review by the Board under Section 8(a) (5)."

The Court below implemented the Trial Examiner's misgivings by stating that enforcement of the Board's Order would "contravene the national [labor] policy" (R. 133). And also noted that the Union's "recourse to the Board under such circumstances as are presented appears to constitute a refusal to participate in the continued collective bargaining process afforded by the grievance and arbitration procedures prescribed" (R. 133).

We submit that both the Trial Examiner and the Circuit Court found themselves in a legal quandary which only this Court can resolve. Both were plagued with the confusion as to what constitutes good faith bargaining during the term of an agreed upon bargain. While the Trial Examiner viewed the matter as one for the discretion of the Board, the Circuit Court apparently felt, properly we believe, that the matter is one for the judiciary, this Court ultimately, to decide. The legal question is simply this: What is the obligation to bargain during the term of the bargain?

While in our opinion this case was not the proper vehicle for reaching this state of legal review, the fact remains that the question has been presented to the Court in this case, so let us commence.

In attempting to delineate the nature, scope and objective of the obligation imposed upon employers and unions during the period of their agreement, it is first necessary to set forth what is *not* included in this review. First, the apparent inconsistency between Sections 10(a)[15] and 203 (d)[16] of the Act are not here involved. For Section 10(a) to have any application, an unfair labor practice must be involved; it obviously is of no import where no unfair labor practice has been committed. We must, therefore, cross the threshold legal question (What is the obligation to bargain during the term of the bargain?) before we get to Section 10(a). And we need never get to Section 10(a) with the attendant problems of concurrent, primary, or exclusive Board jurisdiction, if it is determined that no unfair labor practice exists in the circumstances here involved.

Second, we need not be concerned with the Board's jurisdiction vis-a-vis an arbitrator, the courts, or anyone else. It may well be that in a discrimination case arising under Section 8(a)(3) or in any unfair labor practice case *other*

15. "Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." (49 Stat. 453, as amended, 29 U. S. C. § 160(a)).

16. "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases." (61 Stat. 153, 29 U. S. C. § 173(d)).

than a refusal to bargain, the Board may have exclusive or concurrent jurisdiction with another tribunal.[17]

Third, and finally, we are not here concerned with the Board's authority or lack thereof to interpret a labor agreement under any and all circumstances. It may well be true as the Board argues in its briefs in this case, and the companion case, that it may be necessary in cases *other* than refusal to bargain cases for the Board to construe a labor agreement.[18]

The instant case concerns none of these issues. The issue is what constitutes good faith bargaining during the term of the bargain. Can employers and labor organizations by their agreement define the scope and nature of bargaining during the term of the agreement?

It is submitted that where the parties have bargained, they should have the right to determine which subjects, *if any*, they will continue to bargain about during the contract term, and they should have the right to determine how that bargaining will take place.

The underlying premise which the Board has taken in the instant case, as well as the companion case, is that the agreement does not vary the parties' duty to bargain as that duty existed before agreement was reached. In so doing, the Board has inverted collective bargaining, as that term is understood in the United States, from being a "process" toward an ultimate goal to the status of the ultimate goal.

In *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 342 (1939), this Court stated ". . . the purpose of the statute was to

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17. *E.g.*, concurrent jurisdiction has been upheld in a discriminatory discharge case in *Smith* v. *Evening News Ass'n.*, 371 U. S. 195 (1962).

18. This function apparently has been expressly entrusted to the Board insofar as an agreement may contain an unlawful union security clause or "hot cargo" provision.

compel employers to bargain collectively with their employees *to the end that . . . contracts binding on both parties should be made.*" This objective was not changed by the amendments to the original Wagner Act contained in the Labor Management Relations Act of 1947. As this Court noted in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578 (1960) ". . . The present federal policy is to promote industrial stabilization through the collective bargaining agreement."

It would appear senseless, as the Trial Examiner noted, for an agreement to be reached if the parties thereto could not later rely upon it as the determination of their rights and obligations. The very antithesis of the "refusal to bargain" exists where one party refuses to deviate from the terms of the agreement to "bargain" on another basis.

We submit that the general proposition of law which this Court should enunciate is this:

> The duty to bargain in good faith during the term of a labor agreement is the adherence to and reliance upon the substantive and procedural provisions of that agreement.

The necessary corollary to this proposition is:

> A party's insistence that its collective bargaining agreement be honored cannot constitute a refusal to bargain.

This proposition is based upon the simple proposition that where parties, pursuant to their obligation to bargain, come to an agreement, they should be able (and obligated) to rely upon it. In *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 453 (1957), this Court examined the legislative history of the Taft-Hartley amendments of 1947 and concluded that both houses of Congress "indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts." Again in

Charles Dowd Box Co., Inc. v. *Courtney*, 368 U. S. 502 (1962), this Court spoke of the realization of industrial peace through "refinement" of the bargaining process and concluded ". . . such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored."

Insofar as this requisite "honor" is directed to substantive issues contained in the parties' agreement, the words of the Court of Appeals for the Eighth Circuit have never been subject to judicial doubt:

> "The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for."[19]

Nor is there any reason why this principle of reliance should not apply equally to the *procedure* for bargaining, as well as to the *substance* agreed upon by the parties. To the contrary, the procedural primacy of a labor agreement is what was specifically called for by Congress,[20] in Section 203(d) of the Act.

Thus, in *NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1958), the court, relying on this Court's decision in *Lincoln Mills* stated: ". . . the duty to bargain could be directed by the parties through contractual agreement . . ." and held that the employer's refusal to bargain except through those procedures could not thus be an unfair labor practice. See also, *NLRB* v. *Standard Oil Company*, 196 F. 2d 892, 895 (6th Cir. 1952).

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19. *NLRB* v. *Nash-Finch Co.*, 211 F. 2d 622, 627 (8th Cir. 1954).

20. "Once the parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." House Com. Rep. No. 510 on H. R. 3020, I Legis. Hist. LMRA 545-546 (1947).

The express establishment of this rule of law will, to be sure, most immediately affect the Board's use of the "unilateral change" rationale to participate in the parties' contractual relationship. For example, the Board could not, as it has in the *C & C Plywood Corp.* case (No. 53), declare that the employer's action in changing to a group incentive plan in reliance on the terms of the applicable agreement was a refusal to bargain because the Board's interpretation of the agreement differed from the employer's.

The Board has attempted to circumvent the bargaining primacy of the labor agreement by declaring that the statutory obligation to bargain continues on throughout the term of the bargain, abated *only* to the extent specifically required by the terms of the agreement.

But this Board position assumes that the parties normally bargain to an incomplete bargain; that their final agreement is not final. This assumption ignores the fact that ". . . it has generally been accepted throughout the United States that management's rights not specifically surrendered in a collective bargaining agreement are reserved to management."[21]

Arbitrator Dworkin expressed this principle almost fifteen years ago as follows:

> ". . . Notwithstanding the absence in the contract of a definite management prerogative clause, the arbitrator believes that the company nevertheless retains the exclusive right to manage the business and plant and to direct the working forces, provided, however, that in the exercise of its right, the company is required to observe the provisions of the agreement. The right to manage the business and plant and to direct the working forces include the right to hire, suspend or discharge for proper cause, to transfer, or

21. Arbitrator Wayne Quinlan, *Phillips Petroleum Co.*, 33 Lab. Arb. 379, 384 (1959).

to lay off employees because of lack of work, or for other legitimate reasons. The union reserves the right to use the procedure of the grievance provisions of the agreement if it questions the company's action respecting discharge, discipline, transfer or lay off of any employee. In accordance with well established practice, owners of business establishments possess certain freedoms of action, incidental to their very existence, which has been interpreted as including 'those rights, or that authority which management must have in order to successfully carry out its function of managing the enterprise.' (Hill & Hook, Management at the Bargaining Table, 56 (1945)).'"[22]

Arbitrator Klamon put the matter this way:

"Management has certain inherent rights to operate a plant as efficiently as it can. Even if this right is not reserved and spelled out in broad general terms, it is inherent in business and would be recognized by everyone. It is a residual power somewhat comparable to the inherent police power of the state to make all laws necessary for the safety and welfare of citizens. The only limitations upon it are those which Management itself relinquishes in labor contracts. Such limitations as Management accepts and agrees to necessarily can go no farther than specifically and clearly spelled out. All other inherent powers of management necessarily remain unimpaired."[23]

This rule of construction, which employers and unions have recognized over the years, is that the execution of the labor agreement concludes collective bargaining as that concept is recognized prior to a contract, and funnels the bargaining relationship into a contractual relationship. This does not mean that the bargaining relationship goes into limbo; it does mean that the bargaining responsibilities of the parties are determined by the contract, not by pre-contract principles. Thus, in *Timken Roller Bearing Co.*

22. *William Brooks Shoe Co.*, 19 Lab. Arb. 65, 70 (1952).
23. *Union Starch Refining Co.*, 15 Lab. Arb. 782, 789 (1950).

v. *NLRB*, 161 F. 2d 949, 955 (1947), the Board's attempt to impose its bargaining-over-contract theory was rejected, the Sixth Circuit Court of Appeals stated quite succinctly:

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement."

Once the labor contract is signed, it must be presumed that the collective bargaining guaranteed by the Act has been completed, and all of its results are embodied in the agreement *per se* as a whole. No further collective bargaining rights lying beyond or outside of the specific terms of the contract can be asserted into existence. It must be presumed that whatever matters are not reduced to specific contract provisions in the course of the parties' negotiations of the contract itself are left to the action of management. The exception to this, of course, is when the parties mutually agree to continue negotiations over specific items of general areas and, hence, specifically provide therein for further negotiations during the contract's term for such items.

This "residual rights" doctrine is no abstract theory; it is a living, practical concept required by the facts of industrial life. The rationale was explained close to twenty years ago, as follows:

> "Management is charged with carrying out many policies. One of these policies is contained in the contract with the union. Therefore, it becomes management's job to manage the plant under this contractual policy. The management is always the 'acting' party; there is no basis for the idea that, because a labor contract exists, the union shares jointly the obligation to manage the plant efficiently. That is solely management's obligation.
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> "Many uninitiated observers of the labor union movement believed that as unions matured they could take on a joint function with management in running the

everyday affairs in a plant. The fallacy in any such arrangement is revealed very directly by William Leiserson, formerly a member of the National Labor Relations Board and the Railroad Mediation Board, who said of the ill-fated attempt to administer the Office of Production Management under the dual leadership of Knudsen and Hillman:

"'. . . The President was asked what would happen if they disagree. He answered they would work together and make joint decisions. This was taken as an indication that the government intended the business of defense production to be a joint co-operative enterprise of employers and workers on an equal partnership basis. . . .There developed a confused organization and administration. . . . The arrangement had to be discarded. . . .

"'In retrospect it is easy to see the mistake that was made in establishing the double-headed directorship of the Office of Production Management. It was due to inadequate analysis of the job that was to be done and failure to distinguish functions. We do not have to be versed in the philosophy of management to understand that it is not practical to mix the policy-making functions of an organization with the operating functions.

"'It does not work and it satisfied no one. It leads to maneuvering and argument. It leads to maneuvering and argument about policy among operating officials whose sole duty should be to carry out promptly and efficiently the operating orders. . . . It turns a production organization into a debating society.'

"The basic principles which are to guide the company in its labor relations are established in the union contract. Collective bargaining takes place when the basic policies are hammered out. From that point on, management must manage or the plant managers, instead of managing, become debaters in a debating society.'"[24]

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24. Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations*, LAW AND CONTEMPORARY PROB., 308 (Duke Univ. 1947).

In the companion case, *C & C Plywood*, the Board has urged (at pp. 27-29 of its brief therein) that the residual rights theory is inconsistent with the Board's theory that a waiver of bargaining must be express and clear. We agree. But, we submit, it is not the rest of the American industrial complex which is out of step, it is the Board which is out of step.

The Board's position might well be contrasted with this Court's remarks in the *Warrior & Gulf* case:[25]

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. . . . A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. . . ."

The Board's subjugation of the parties' agreement is based, we believe, upon an undue concentration upon the pre-contract nature of the duty to bargain and a failure to recognize that the duty may well, and should, take a different form after the parties reach their agreement.

As pointed out by this Court:

> "... The Board has not been commissioned to effectuate the policies of the Labor Relations Act so single mindedly that it may wholly ignore other and equally important Congressional objectives."[26]

This admonition is no less applicable to a situation where, as here, the Board's vision has been restricted to a single facet of the Labor Act's objectives.

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25. 363 U. S. 574, 583 (1960).

26. *Southern SS Co.* v. *NLRB*, 316 U. S. 31, 47 (1941).

The proposition of law here propounded assumes that the parties impliedly—even if not expressly—consider their collective bargaining agreement to be a total agreement.[27] The Board's contrary assumption reveals, we submit, the Board's lack of expertise in the interpretation of labor agreements. We would, of course, agree with Professor Bernard Dunau's statement:

> "The NLRB has no special expertise in the interpretation of the substantive provisions of a collective bargaining agreement. . . ."[28]

There is another reason why the Board should stay out of labor contract administration. The Board is a governmental agency, representing and protecting the public interest. Its invasion with what is at the time a private, contractual relationship constitutes an unjustified inconsistency with its basic purpose. In the *Sinclair* case, the court noted this:

> "But if the Union may, as it has done here, call upon an outside agency as the weapon for discovery of information which, on one of the alternative constructions of the contract, will be completely superfluous, the whole proceeding is necessarily disrupted. The arbiters cannot continue. The whole controversy then shifts from the plant to the nearest Board hearing room, and thereafter to the nation's capital, and then on to the seat of any one of the eleven Courts of Appeals having geographical jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties. More than lost time, it introduces or magnifies advocative

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27. Just as in the present case the parties included in their contract the following language (G. C. Ex. 3; R. 107):

> "Section 1. This Agreement supersedes and cancels all previous agreements between the parties and constitutes the entire agreement between the parties, concluding bargaining for its term."

28. Dunau, *Contractual Prohibitions of Unfair Labor Practices: Jurisdiction Problems*, 57 COL. L. REV. 52 (1957).

> hostility. For now a new adversary has entered the lists—the General Counsel who, from the nature of the complaint, aligns himself with one of the adversaries—the Union—but who as a sort of protector of the general public interest must advance his advocacy, pro and con, not in the manner best calculated to bring an end to the dispute, but in a manner thought, from that lofty vantage, to be best for the general good. Even worse, that diversion ends in a decision which, if it determines the substantive issue adversely to the Employer as does this one leaves the Employer facing an additional adversary—the Board. This makes it necessary for the Employer to resist that determination in order to get the matter back where it started—in the laps of the arbitrators. To do that the Employer must come to court. But the courthouse, says the Supreme Court, is not the place to work out industrial disputes when arbitration has been prescribed and is available.'"[29]

The other side of this coin was noted by Arbitrator Saul Wallen, a former President of the National Academy of Arbitrators:

> "The arbitrators who decide the majority of cases presented to arbitration in this country, the ones who . . . are called back time and again to serve have met a test no judge is ever called upon to meet—the test of the market place, the judgment of those in a position to contract frequently for their services."[30]

The Board cannot claim the same sort of realistic objectivity as the professional arbitrator.

Finally, as the Trial Examiner noted (R. 24), the Board is already overburdened. This Court may take judicial notice of the growing number of full time, professional labor arbitrators in this country. If the Board is to place

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29. *Sinclair Refining Company* v. *NLRB*, 306 F. 2d 569, 579 (5th Cir. 1962).

30. The Southwestern Legal Foundation, Proceedings of the 12th Ann. Inst. on Labor Law, to be published.

itself into the arbitration function, the resulting delay in the administration of labor agreements could well be catastrophic.[31]

III. THE REFUSAL TO GIVE CONTRACT INFORMATION CANNOT CONSTITUTE A REFUSAL TO BARGAIN.

Assuming for the moment that the information here sought was in fact "related" to the parties' labor agreement, the refusal to give such information nevertheless could not constitute a refusal to bargain.

If the term "related" connotes nothing more than some sort of connection, then the Board would be declaring it to be a refusal to bargain to refuse to furnish any information which has some connection to a contract term. To but state the possibility is to reveal the impropriety.

If the term "related", however, connotes actual relevance to a contract provision, then the determination of that relevance is a matter for the parties' agreed upon procedure to determine and the general proposition set forth in Point II, *supra,* obtains.

We believe that the question of an employer's statutory duty to provide a union with information has been inundated with too many generalizations in thinking and discussion.

The cases first arose involving wage and related data. It was easy to see the relevance of such information, and the decisions uniformly so held. But the language and the reasoning therein noted should be carefully reviewed for as the court in the *Sinclair Refining* case noted:

"Now we must regard § 8(a)(5) data-producing-order in the light of the pervasive policy to encourage the

31. One need only look as far as this case to see that if the union had seriously believed that employees were adversely affected by the Company's actions, it would have left those employees without relief for almost three years.

fullest use of the machinery established by the parties for the resolution of disputes arising under the collective bargaining contract."

We submit that relevant information which is ". . . *directly related* to the Union's function as a bargaining representative"[32] may be required of an employer, *unless* the employer proves that under the particular circumstances, the refusal is not a refusal to bargain in good faith.

For example, if a union demanded certain wage data (of which relevance is presumed), and the employer showed (a) he had previously given substantially similar data, or (b) that the union had specifically waived the right to the particular data, or (c) the employer did not have the specific data requested, or (d) the data requested was far too voluminous for the employer to compile at its own cost, should an 8(a)(5) violation be found? We think not.

Further, we submit that information, the relevance of which depends *solely* upon the the existence of a labor agreement, is not and cannot, as a matter of law, be directly related to the Union's function as a bargaining representative. There is an intervening factor negating the requisite direct relationship, and that factor is the labor agreement. If the information sought is *directly related* to the bargaining function without recourse to the parties' agreement, that is one situation. But if its relation to the union's bargaining function is dependent upon, or arises out of the labor agreement, it is not *directly* related to the union's bargaining function.

Indeed one of the authors cited and quoted by the Board in its brief (p. 23) concluded as follows:

"Certainly the case for Board deference is not insubstantial. So long as the union demand for the information is based on its asserted relevance to a griev-

32. *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149, 155 (7th Cir. 1958).

ance, the primary question is one of contract construction. Indeed, it is apparently not disputed that the withholding of information cannot be deemed a violation unless there has been an adjudication somewhere of the incorrectness of the company's interpretation of the contract." (Lesnick, Arbitration as a Limit on the Discretion of Management, Union and NLRB, Proceedings of New York University Eighteenth Annual Conference on Labor, 7, 27-28 (BNA 1966)).

This Court's decision in the *Woolworth* case[33] does not conflict with this principle. In that case, the Union's request concerned wage data—a matter having an obvious, direct and intrinsic bearing upon the employer-employee relationship. A matter, it should be noted, which quite obviously did not rely for its relevance on the existence of a labor agreement or the proper construction thereof. The same inherent relevance attached to the information requested in all other Court cases cited by the Board in its brief.

Thus, in the *Timken* case[34] the Court of Appeals specifically noted at the outset of its opinion that it was a "wage data case." Furthermore, no issue of contract construction of the underlying subject matter was noted; the Employer therein merely contending that relevant information should be obtained through arbitration, not voluntarily submitted during the grievance procedure. The Court did note that if the determination of "relevance" was dependent upon the construction of the parties' agreement, the parties' channeling of the method of such bargaining would necessarily control.

A similar fact situation was presented to the Court of Appeals in *Fafnir Bearing Co.* v. *NLRB*, 62 LRRM 2415 (2d Cir. 1966). There the Union requested information

33. *NLRB* v. *F. W. Woolworth Co.*, 352 U. S. 938 (1956).

34. *Timken Roller Bearing Company* v. *NLRB*, 325 F. 2d 746 (6th Cir. 1963); cert. denied 376 U. S. 971 (1964).

with respect to the computation of incentive rates. Similar facts were ordered to be made available in *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149 (7th Cir. 1958).

The recent decision of the Third Circuit in *Curtiss-Wright Aero Div.* v. *NLRB*, 347 F. 2d 61 (1965) did not concern wage data; it is, however, similar to all other cases cited by the Board inasmuch as it concerned the Employer's attempt to take employees out of the bargaining unit—a matter not dependent upon a construction of the Agreement for its relevance to the bargaining relationship.

The *Sinclair*[35] and the *Square D*[36] cases recognized the contract dependence nature of the information sought and refused to uphold the Board's gratuitous attempt at arbitration. These decisions, it might be noted, are in obvious accord with this Court's statement in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*: ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction that was bargained for."[37]

If the Board's position were to prevail, i.e., that any information related to a contract must be furnished upon request, the distinction between mandatory and permissive subjects of bargaining becomes unclear. For example, can it be said that the removal of equipment (antiquated, unused, etc.), is a mandatory subject for bargaining without regard to its effect on employees? We believe the answer is obviously no. Yet here, the Board is saying that a refusal to furnish information concerning such is a refusal to bargain: A strange—and unnecessary—result indeed.

The Board's attempt to "relate" information to the contract prior to a determination of the contract by the

35. *Sinclair Refining Company* v. *NLRB*, *supra* n. 29.
36. *Square D Company* v. *NLRB*, 332 F. 2d 360 (9th Cir. 1964).
37. 363 U. S. 593, at 599 (1960).

arbitrator is also at crossed swords with this Court's view of the meaning of a collective bargaining agreement. It is beyond Respondent's comprehension how the Board could find a contractual provision upon which to hang the relationship when "the processing of disputes through the grievance machinery is actually a vehicle by which *meaning and content* are given to the . . . agreement."[38]

The Board's attempt to relegate the *Sinclair* and *Square D* decisions to questions of "grievability" rather than substantive construction ignores the clear wording in both decisions that the underlying issue was arbitrable. Needless to say, an arbitrable issue is perforce "grievable" whatever that term might suggest.

Nor should the Board legitimately concern itself, as it apparently has in its brief, with fears that reliance upon arbitration is a last resort, frustrating the efficient handling of grievances through the lower steps of the procedure. This Court has already declared that labor arbitration is neither a substitute for litigation nor a process to be invoked only if "there has been a breakdown in the working relationship."[39]

Similarly, the Board's doubts that an arbitrator may not possess sufficient authority to compel production of information which is in fact relevant to the proceeding before him are unfounded. The failure of the proposed United States Arbitration Act to include broad subpoena power, as noted in the Board's brief, hardly suggests a weakness in the arbitral process. The Board failed to note the reason behind this omission in the proposed Act:

> "The power of subpoena is really unnecessary, as experience shows, and to introduce it would be to

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38. *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, *supra*, at 581.

39. Ibid.

invite difficulties in the form of an attempt. . . to harass an opponent by 'fishing' for documents.'"[40]

Finally, it should be noted that the Board's professed doubts of inadequate subpoena power are divorced from the facts in the instant case. Illinois, where the grievances herein arose, has adopted the Uniform Arbitration Act granting arbitrators the power of subpoena.[41]

The Board and the Union have also suggested that arbitration is in dire need of help from the Board. Professor Fleming was cited again in support of this proposition, but what Professor Fleming stated was that while complaints had been directed against the arbitration process, that process "must surely go down in history as one of democracy's most successful experiments in private self-government."[42] No further defense appears necessary in view of this Court's declaration of utmost respect for arbitration as a process and arbitrators as individual problem solvers.

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40. Challenges to Arbitration, Proceedings of the Thirteenth Annual Meeting National Academy of Arbitrators, p. 164 (BNA 1960). Professor Fleming makes the same observation in the opus cited by the Board in its brief:

> ". . . But this is not a serious handicap—as is evidenced by the fact that the proposed United States Arbitration Act, drafted by a committee of the National Academy of Arbitrators, does not even include such a provision. Neither side is inclined to withhold a genuinely relevant document because to do so invites an adverse ruling arising partly out of the arbitrator's inference that the document is damaging to the party withholding it."

(FLEMING, THE LABOR ARBITRATION PROCESS, p. 175 (Univ. of Ill., 1965)).

41. "The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence . . . Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases." Ch. 10 ILL. STATS. ANN. § 1007(a) (Smith-Hurd, 1966).

For an example of how this procedure has been utilized in preparation for a hearing on the merits of a grievance, see *Automatic Electric Co.*, 42 Lab. Arb. 1056 (Arb. John F. Sembower, 1964).

42. FLEMING, *op. cit. supra, at pp.* 222-23.

Furthermore, the use of the Board's processes as an alternative forum for resolving matters incidental to the arbitration hearing must necessarily result in the fractionalization of disputes. As this Court noted in its *Wiley* decision:[43]

> ". . . It would be a curious rule which required that intertwined issues of substance and procedure growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."

The Board's final rationalization in attempting to justify its invasion of the field of contract administration is that discovery proceedings in a court are extremely broad, so should they be in a grievance procedure. This attempt to impose a principle of adversary litigation upon a continuing bargaining relationship is indicative, in our opinion, of the Board's failure to grasp the significance of the labor contract relationship.[44] Moreover, the analogy is further imperfect in that in a discovery proceeding, the tribunal before which the matter is to be heard determines relevance.

CONCLUSION.

Can it be possible that an employer is guilty of refusing to bargain in good faith because he fails to tell the union representing his employees where he disposed of a piece of equipment last used eight years ago?

Can it be possible that an employer is guilty of an unfair labor practice by failing to advise the Union where

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43. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 557 (1964).

44. Note in this regard this Union's grievance claim that it wished to bargain about equipment changes, in face of the previously agreed upon bargain set forth in Section 10 of Article VI.

certain equipment has gone when new equipment already has been obtained to replace it?

Can it be possible that an employer is guilty of violating the federal labor law by failing to give the Union information its officials have stated they already have?

Can all of these violations be found under the guise of administering a labor contract? The Labor Board says yes, but for the reasons set forth in this brief, we respectfully submit that the answer must be NO.

As Professor Woolett stated in his article: *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction,* 10 Lab. L. J. 477, 478 (1959):

> "If the Board does not respect the integrity of the private arrangement by eschewing the exercise of a competing jurisdiction, it may corrupt the mechanism by opening up an alternative forum to the recalcitrant party, who may run to the Board with his complaint, rather than resort to the agreed-upon procedure."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1966.

National Labor Relations Board, Petitioner, *v.* Acme Industrial Co.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

In *NLRB* v. *C & C Plywood, ante,* p. —, decided today, we dealt with one aspect of an employer's duty to bargain during the term of a collective bargaining agreement. In this case we deal with another—involving the obligation to furnish information that allows a union to decide whether to process a grievance.

In April 1963, at the conclusion of a strike, the respondent entered into a collective bargaining agreement with the union which was the certified representative of its employees. The agreement contained two sections relevant to this case. Article I, § 3, provided, "It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work . . . ." In Art. VI, § 10, the respondent agreed that "[i]n the event the equipment of the plant . . . is hereafter moved to another location of the Company, employees working in the plant . . . who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement cover-

ing . . . employees at such location." A grievance procedure culminating in compulsory and binding arbitration was also incorporated into the collective agreement.

The present controversy began in January 1964, when the union discovered that certain machinery was being removed from the respondent's plant. When asked by union representatives about this movement, the respondent's foremen replied that there had been no violation of the collective agreement and that the company, therefore, was not obliged to answer any questions regarding the machinery. After this rebuff, the union filed 11 grievances charging the respondent with violations of the above quoted clauses of the collective agreement. The president of the union then wrote a letter to the respondent, requesting "the following information at the earliest possible date:

"1. The approximate dates when each piece of equipment was moved out of the plant.

"2. The place to which each piece of equipment was moved and whether such place is a facility which is operated or controlled by the Company.

"3. The number of machines or equipment that was moved out of the plant.

"4. What was the reason or purpose of moving the equipment out of the plant.

"5. Is this equipment used for production elsewhere."

The company replied by letter that it had no duty to furnish this information since no layoffs or reductions in job classification had occurred within five days (the time limitation set by the contract for filing grievances) prior to the union's formal request for information.

This refusal prompted the union to file unfair labor practice charges with the Board. A complaint was issued, and the Board, overruling its trial examiner, held

the respondent had violated § 8 (a)(5) of the Act[1] by refusing to bargain in good faith. Accordingly, it issued a cease-and-desist order. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed" and pointed out that the agreement contained no "clause by which the Union waives its statutory right to such information."

The Court of Appeals for the Seventh Circuit refused to enforce the Board's order. 351 F. 2d 258. It did not question the relevance of the information nor the finding that the union had not expressly waived its right to the information. The court ruled, however, that the existence of a provision for binding arbitration of differences concerning the meaning and application of the agreement foreclosed the Board from exercising its statutory power. The court cited *United Steelworkers* v. *Warrior & Gulf Navig. Co.*, 363 U. S. 574, and *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, as articulating a national labor policy favoring arbitration and requiring the Board's deference to an arbitrator when construction and application of a labor agreement are in issue. We granted certiorari to consider the substantial question of federal labor law thus presented. 383 U. S. 905.

There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. *NLRB* v. *C & C Plywood Co.*, *ante*, p. —; *NLRB* v. *F. W. Woolworth Co.*, 352 U. S. 938. The only real issue in this case, therefore, is whether the

[1] National Labor Relations Act, as amended, 61 Stat. 141, 29 U. S. C. § 158 (a)(5) (1964 ed.).

Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under § 8 (a)(5).

The two cases upon which the court below relied, and the third of the *Steelworkers* trilogy, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, do not throw much light on the problem. For those cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. 363 U. S., at 567, 581–582, 596–597. The relationship of the Board to the arbitration process is of a quite different order. See *Carey* v. *Westinghouse*, 375 U. S. 261, 269–272. Moreover, in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under § 301,[2] must be considered. Section 8 (a)(5) proscribes failures to bargain collectively in only the most general terms, but § 8 (d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising [under an agreement] . . . ."[3] And § 10 (a)[4] provides: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be estab-

[2] Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

[3] Cf. *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 581: "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

[4] 29 U. S. C. § 160 (a) (1964 ed.).

lished by agreement, law or otherwise: . . . ." Thus, to view the *Steelworkers* decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator[5] is to overlook important distinctions between those cases and this one.

But even if the policy of the *Steelworkers Cases* were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here. For when it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decided nothing about the merits of the union's contractual claims.[6] When the respondent furnishes the requested information, it may appear that no subcontracting or work transfer has occurred, and, accordingly, that the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the respondent's contention that no breach of the agreement occurred because no employees were laid off or reduced in grade within five days prior to the filing of any grievance. Such con-

[5] See *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569, 570 (C. A. 5th Cir.).

[6] Cf. 4 Moore, Federal Practice, ¶ 26.16[1], 1175–1176 (2d ed.):

"[I]t must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy."

Id., at 1181:

"Examination as to relevant matters should be allowed whether or not the theory of the complaint is sound or the facts, if proved, would support the relief sought."

clusions would clearly not be precluded by the Board's threshold determination concerning the potential relevance of the requested information. Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.[7]

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.[8] The expense of arbitration might be placed upon the union only for it to learn that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.

We hold that the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

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[7] This case, therefore, differs from *NLRB* v. *C & C Plywood Corp.*, *ante*, p. —, where the Board's determination that the employer did not have a contractual right to institute a premium pay plan was a determination on the merits. See *C & C Plywood*, *ante*, at 5, and n. 10.

[8] See *Fafnir Bearing Co.* v. *NLRB*, 362 F. 2d 716, 721:

"By preventing the Union from conducting these studies [for an intelligent appraisal of its right to grieve], the Company was, in essence, requiring it to play a game of blind man's bluff."